

October 12, 2001

Ms. Susan C. Rocha
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Attorney for the San Antonio Water System
1700 Tower Life Building
310 South St. Mary's Street
San Antonio, Texas 78205-3111

OR2001-4632

Dear Ms. Rocha:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 153196.

The San Antonio Water System (the "SAWS") received a request for "[a]ll sexual harassment complaints filed since January 1, 1999 (Current and closed)" with the names of the victims and witnesses redacted. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

The present request was originally part of a larger request for fifteen categories of information received by SAWS on July 2, 2001, which was addressed in Open Records Letter No. 2001-4206 (2001). Upon your late submission regarding category five of that request, a new file was inadvertently opened by this office. Thus, the documents you submitted as responsive to category five of the request were included with this new file, and not with the original file. As a result, Open Records Letter No. 2001- 4206 (2001) ordered the release of the documents responsive to category five of the request. As the responsive documents were actually received by this office prior to the issuance of Open Records Letter No. 2001-4206 (2001), we will now address whether those documents are subject to required public disclosure under the Public Information Act. Therefore, Open Records Letter No. 2001-4206 (2001) is overruled to the extent it conflicts with this ruling.

Initially, we must address SAWS' obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the

information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. SAWS received the present request on July 2, 2001. However, SAWS did not submit the documents responsive to category five of the request until August 8, 2001. Therefore, SAWS failed to submit this information within the fifteen-day deadline as required by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. See Gov't Code § 552.302; Hancock v. State Bd. of Ins., 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Sections 552.103, 552.107, and 552.111 are discretionary exceptions under the Public Information Act and do not demonstrate a compelling reason to withhold information from the public. See, e.g., Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). We accordingly do not address your section 552.103, 552.107, and 552.111 assertions. On the other hand, sections 552.101 and 552.102 provide compelling reasons to overcome the presumption of openness. See Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). We will therefore address your arguments under sections 552.101 and 552.102.

Next, you indicate that the information provided under "Number 3" and some of the information provided under "Number 4" is not responsive. One of the documents submitted under "Number 3" pertains to a complaint filed in 1998. As the request seeks information as of January 1, 1999, we agree that this document, which we have marked, is not responsive to the present request. We note, however, that the other document provided under "Number 3" is a complaint dated April 6, 1999, and is therefore responsive to this request. We also agree that portions of the information under "Number 4," which we have marked, relate to allegations of retaliation, rather than sexual harassment, and are therefore not responsive to the present request.

We note that one of the documents submitted under "Number 4" consists of a completed Investigative Report, and normally must be released pursuant to section 552.022(a)(1) of the Government Code. Section 552.022 makes "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" public information unless expressly made confidential under other law or "except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1).

You argue that the submitted information must be withheld in its entirety under sections 552.101 and 552.102 because "even if SAWS redacts the information regarding the names of the victim or witness, the identification of the victim and/or witness will still be identifiable." Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and incorporates the doctrine of common law privacy. You also raise section 552.102, which protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as the protection provided by the common law right to privacy under section 552.101. Hubert v. Harte-Hanks Tex. Newspapers, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Consequently, we will consider these two exceptions together.

You also contend that the submitted information "has constitutional privacy issues." Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

For information to be protected from public disclosure under common law privacy, the information must meet the criteria set out in Industrial Foundation v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. Id. at 685; Open Records Decision No. 611 at 1 (1992). In Morales v. Ellen, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in Ellen contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. Ellen, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. Id. In concluding, the Ellen court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." Id. When there is an adequate summary of the investigation, the summary must be released, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure.

Because there is no adequate summary of the investigation with respect to "Number 1" and the responsive complaint under "Number 3", you must release the information in "Number 1" and the responsive information in "Number 3" in its entirety. However, based on *Ellen*, SAWS must withhold the identity of the victims and witnesses of the harassment from disclosure. We have marked the information in "Number 1" and the responsive complaint in "Number 3" that must be withheld under common law privacy.

On the other hand, upon review of the information submitted under "Number 2," we conclude that it consists of an adequate summary of the investigation, release of which we believe serves the legitimate public interest in the harassment allegations. We also conclude that the information submitted under "Number 4" contains an adequate summary of the investigation, which we have marked, release of which we believe serves the legitimate public interest in the harassment allegations. Based on *Ellen*, however, SAWS must withhold the identities of the victim and witnesses, which we have marked, from the information that must be released. Because the redacted summary under "Number 4" adequately serves the public interest in the information at issue, we further conclude that the remaining document under "Number 4" is excepted from disclosure under section 552.101 in conjunction with the common law right to privacy.

You argue that the submitted information must be withheld in its entirety in order to protect the victims' and witnesses' identities. We conclude, however, that the privacy interests of the victims and witnesses have been adequately protected by redacting their names and other identifying information (i.e., addresses and telephone numbers). Therefore, there is no need to withhold any additional information under section 552.101 in conjunction with *Ellen*.

We note that some of the submitted information may be confidential under section 552.117 of the Government Code. Section 552.117 excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). Therefore, SAWS may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received. For any employee who timely elected to keep his or her personal information confidential, SAWS must withhold the employee's home address and telephone number, social security number, and any information that reveals whether the employee has family members. SAWS may not withhold this information under section

552.117 for an employee who did not make a timely election to keep the information confidential. We have marked the type of information that is excepted from disclosure under section 552.117 if the employee has made a timely election under section 552.024.

To summarize: (1) we have marked the information in "Number 3" and "Number 4" that is not responsive to this request; (2) we have marked the information that must be withheld under section 552.101 and common law privacy; and (3) we have marked the type of information that must be withheld under section 552.117 if the employee has made a timely election under section 552.024. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dept. of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Karen Eckerle

Assistant Attorney General Open Records Division

Karen a. Eckerle

KAE/sdk

Ref: ID# 153196

Enc: Submitted documents

c: Mr. Brian Collister

Investigative Reporter

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(w/o enclosures)